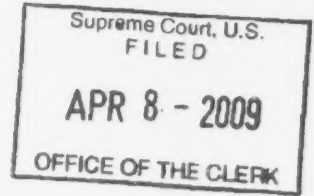


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No. 08-1016

In The
Supreme Court of the United States

MCA ASSOCIATES, L.P.,
Petitioner,

v.

TOWNSHIP OF MONTVILLE, DEPARTMENT OF
ENVIRONMENTAL PROTECTION OF THE
STATE OF NEW JERSEY, AND THE
COMMISSIONER OF THE DEPARTMENT OF
ENVIRONMENTAL PROTECTION
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPERIOR COURT OF NEW JERSEY,
APPELLATE DIVISION

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES.	ii
COUNTERSTATEMENT OF THE CASE.	1
ARGUMENT	
CERTIORARI IS NOT WARRANTED BECAUSE THE TOWNSHIP OF MONTVILLE PAID PETITIONER FULL MARKET VALUE FOR THE PROPERTY IT CONDEMNED IN 2002 AND NEW JERSEY COURTS PROPERLY REJECTED PETITIONER'S ATTEMPT TO LATER AUGMENT THAT AWARD THOUGH AN INVERSE CONDEMNATION CLAIM AGAINST NJDEP WHICH WAS LEGALLY UNTENABLE	6
CONCLUSION.	10

TABLE OF AUTHORITIES

CASES CITED

287 Corporate Center Associates. v. Township of Bridgewater, 101 F.3d 320 (3rd Cir. 1996). . .	5, 8
Township of Montville v. MCA Associates et als., 197 N.J. 14 (2008).....	1
Kokkonen v. Guardian Life Ins. Co. Of Am. 511 U.S. 375 (1994).....	2, 6
Nolan v. Lee Ho, 120 N.J. 465 (1990).....	6
Penn Central Trans. Co. v. New York City, 438 U.S. 104 (1978).	2
Pheasant Ridge Corp v. Twp. of Warren, 169 N.J. 282 (2001), cert. denied, 535 U.S. 1077 (2002). . . .	7
Rieder v. State, 221 N.J.Super. 547 (App. Div. 1987).	8
Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725 (1997).	5
United States v. Clark, 445 U.S. 253 (1980).	8
Village of Euclid v. Ambler Realty, 272 U.S. 365 (1926).....	7

STATUTES

33 U.S.C.A. §1344.	4
N.J. Stat. Ann. §13:9-1.	1
N.J. Stat. Ann. §14:2A-1.	5, 7
N.J. Stat. Ann. §20:3-1.	1
N.J. Stat. Ann. §20:3-2(j).	2
N.J. Stat. Ann. §20:3-8.	8
N.J. Stat. Ann. §20:3-19.	2
N.J. Stat. Ann. §20:3-20.	9
N.J. Stat. Ann. §20:3-22.	9
N.J. Stat. Ann. §58:16A-50.	2

COURT RULES CITED

N.J. Court Rule 4:73-6.	3
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BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE CASE

Petitioner MCA Associates asks this Court to review a New Jersey Supreme Court decision, *Township of Montville v. MCA Associates et als.*, 197 N.J. 14 (2008), declining review of an unpublished Appellate Division case (Pa1-Pa22)¹ holding that Petitioner could not raise an inverse condemnation claim against the New Jersey Department of Environmental Protection (NJDEP), after the property had been condemned by the Township of Montville and during a proceeding intended to calculate the compensation the Township owed Petitioner under the New Jersey Eminent Domain Act (EDA), N.J. Stat. Ann. §20:3-1 et seq.

The Court should deny the Petition because the decision presents no issue of federal law. The Township has agreed to pay Petitioner \$2,648,500, the fair market value (FMV) for the 42-acre property it condemned in 2002 and for which Petitioner's president paid \$300,000 in 1993. (Pa5). This value assumes the property could be used for a 52,000 square foot commercial development that was permitted by NJDEP in 1995 under the Freshwater Wetlands Protection Act (FWPA), N.J. Stat. Ann. §13:9-1 et seq. (Pa10). Petitioner will receive from the Township the FMV to which it is entitled. Furthermore, Petitioner's claim against NJDEP is based upon the provisions of a 1977 consent judgment

¹ "Pa" refers to the appendix to the petition for certiorari. "P" refers to the petition.

between DEP and its predecessor-in-title. (P4; Pa6-Pa8; Pa18). Interpretation of a state court consent judgment does not raise an issue of federal law. *Kokkonen v. Guardian Life Ins. Co. Of Am.* 511 U.S. 375, 398 (1994).

Petitioner's inverse condemnation claim against NJDEP also was untimely. The property contains freshwater wetlands which DEP has regulated under the FWPA since 1988, and flood plain which DEP has regulated since 1977 under the Flood Hazard Area Control Act (FHACA), N.J. Stat. Ann. §58:16A-50 et seq. In 1995, Petitioner received FHACA and FWPA permits to construct a 52,000 square foot shopping center on the property, which was never built. (Pa10). Petitioner never alleged that these permit decisions caused a taking of its property without just compensation under *Penn Central Trans. Co. v. New York City*, 438 U.S. 104, 124 (1978). In addition, Petitioner never appealed the 2002 trial court order (Pa3) awarding the Township title to the property pursuant to N.J. Stat. Ann. §20:3-19, a final judgment appealable as of right pursuant to N.J. Stat. Ann. §20:3-2(j). Petitioner's failure to appeal the 1995 NJDEP permits or the 2002 Township condemnation prevents it from claiming its property was taken without compensation by NJDEP.

The Condemnation Commissioners appointed pursuant to the EDA concluded that the market value of the property was \$1,378,000, taking into consideration the fact that a 52,000 square foot shopping center could lawfully be constructed on the property under NJDEP permits (Pa3;P4); since then,

the Township has agreed to increase the figure to \$2,648,500. (Pa5). Petitioner appealed the Condemnation Commissioners' award de novo in the Law Division of Superior Court pursuant to New Jersey Court Rule 4:73-6. During that proceeding, Petitioner filed a third-party complaint against NJDEP alleging "inverse condemnation" based on the theory that a 1977 consent judgment between NJDEP and Petitioner's predecessor-in-title exempted the property from any future environmental regulation such as the FWPA (P4; Pa6-Pa8; Pa18). Petitioner demanded judgment against NJDEP for the pre-FWPA value of the property, reduced by the amount of compensation it received from the condemnor-Township. (Pa18-Pa19).

The Appellate Division affirmed the trial court decision granting NJDEP's motion to dismiss the third party complaint. (Pa22). Analyzing the 1977 judgment under New Jersey principles of contract law, the Appellate Division found that the 1977 judgment was a limited-purpose document that settled a 1975 claim for inverse condemnation against NJDEP arising from application of the FHACA. (Pa6; Pa27-Pa28; Pa34). At that time, NJDEP had not yet delineated the flood plain along the Rockaway River as required by the FHACA, and plaintiff-property owners sought to compel NJDEP to condemn the property because they could not determine what portion of it was developable under the FHACA. In the 1977 judgment, the parties stipulated to a "flood water encroachment line" on the property which delineated the area available for development (Pa6) and recorded that delineation with the property deed (Pa7-Pa8; Pa27), thereby eliminating

the need for a FHACA permit to develop the remainder of the property under "the regulations in effect at the time." (Pa6-Pa7;Pa30;Pa33).

The Appellate Division observed that the 1977 consent judgment was silent about the freshwater wetlands on the property which, prior to 1988, were regulated by the U.S. Army Corps of Engineers (ACOE) pursuant to 33 U.S.C.A. §1344. (Pa8;Pa19-Pa20). However, the parties expressly anticipated the possibility of more stringent regulations in the future. (Pa20). Paragraph Eight of the judgment states:

In the event that plaintiffs' rights with respect to the said property shall be affected by subsequent statutory modification by the Legislature of the State of New Jersey, there is hereby reserved to plaintiffs such rights in condemnation or other rights as may be provided by law and this Judgment shall in n way be constructed to affect any such rights of plaintiffs. (Pa7).

The Appellate Division correctly affirmed the trial court's holding (Pa27;Pa30) that the purpose of the 1977 judgment was to determine the use of the property under the FHACA (Pa27-Pa30), and that nothing in the 1977 judgment gave Petitioner a right to compensation for a loss in value attributable to environmental regulations enacted after the 1977 judgment. (Pa21-Pa22;Pa33-Pa34). The Appellate Division affirmed that such an interpretation would conflict with the purpose of the 1977 judgment. (Pa20).

In addition, the Appellate Division also determined that Petitioner could not sue NJDEP for inverse condemnation after the property had already been condemned by the Township. (Pa14-Pa18). The holding is legally unremarkable. Petitioner's claim alleging "wrongful" application of the 1988 FWPA to the property in violation of the 1977 judgment expired in 1994. N.J. Stat. Ann. §14:2A-1 (imposing six year statute of limitations on takings claims); 287 Corporate Center Associates. v. Township of Bridgewater, 101 F.3d 320 (3rd Cir. 1996). Indeed, mere application of regulations to property seldom constitutes a taking, especially when permits are available. *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 736 (1997).

In addition, NJDEP approved the only development application Petitioner ever filed in 1995. Thus, after 1995, NJDEP took no action to affect Petitioner's property. In 2002, title to Petitioner's property passed to the Township without objection by the Petitioner. For these reasons, the New Jersey Supreme Court appropriately declined to review the Appellate Division decision dismissing Petitioner's inverse condemnation claim against NJDEP, and this Petition should also be denied.

ARGUMENT

CERTIORARI IS NOT WARRANTED BECAUSE THE TOWNSHIP OF MONTVILLE PAID PETITIONER FULL MARKET VALUE FOR THE PROPERTY IT CONDEMNED IN 2002 AND NEW JERSEY COURTS PROPERLY REJECTED PETITIONER'S ATTEMPT TO LATER AUGMENT THAT AWARD THOUGH AN INVERSE CONDEMNATION CLAIM AGAINST NJDEP WHICH WAS LEGALLY UNTENABLE.

Petitioner will receive \$2,648,500 from the Township for the condemnation of its property (Pa5) but claims it is entitled to additional compensation from NJDEP. Petitioner seeks compensation "pursuant to the provisions of the [1977] consent judgment" between NJDEP and its predecessor-in-title arising from NJDEP regulation of development in freshwater wetlands under the 1988 FWPA. (P4) However, interpretation of a state court consent judgment does not raise any issue of federal law. *Kokkonen v. Guardian Life Ins. Co. Of Am.* 511 U.S. 375, 398 (1994). Moreover, the New Jersey courts properly analyzed the 1977 judgment under the New Jersey law of contracts, *Nolan v. Lee Ho*, 120 N.J. 465, 472 (1990), and correctly concluded that the intent of parties in 1977 was to settle claims under the FHACA by setting a flood water encroachment line demarcating the portion of the property that could be developed under

the FHACA (Pa6), not to exempt the property from all future environmental legislation such as the 1988 FWPA. Noting that the freshwater wetlands on the property were regulated by the ACOE at that time, and the ACOE was not a party to the lawsuit, the trial court and the Appellate Division properly concluded that any claim Petitioner brought based upon regulation of freshwater wetlands was beyond the scope of the 1977 judgment. (Pa8, Pa34). Furthermore, the parties anticipated more restrictive legislation in the future by reserving for the property owner in Paragraph 8 of the judgment "such rights in condemnation or other rights as may be provided by law and this Judgment..." (Pa7).

Petitioner's attempt to convert a state-law breach of contract claim into an inverse condemnation action does not create a federal issue. Petitioner is claiming that NJDEP owes it compensation for the development value of its property as if the FWPA never applied to the property. Petitioner confuses inverse condemnation with a claim for diminution in land value as a result of regulation. Diminution in land value itself does not constitute a taking. *Village of Euclid v. Ambler Realty*, 272 U.S. 365 (1926); *Pheasant Ridge Corp v. Twp. of Warren*, 169 N.J. 282 (2001), cert. denied, 535 U.S. 1077 (2002). Furthermore, NJDEP approved a 52,000 square foot shopping center on the property in 1995, which approval was reflected in the FMV paid by the Township. Even if mere application of the 1988 FWPA to the property was actionable, the statute of limitations on such a claim expired in six years, by 1994. N.J. Stat. Ann. §14:2A-1 (imposing six year

statute of limitations on takings claims); 287 Corporate Center Associates. v. Township of Bridgewater, 101 F.3d 320 (3rd Cir. 1996).

The Appellate Division decision dismissing Petitioner's inverse condemnation complaint is also consistent with other legal principles. Inverse condemnation, like direct condemnation, results in a shift of title to the public entity. *United States v. Clark*, 445 U.S. 253, 257 (1980); *Rieder v. State*, 221 N.J.Super. 547, 553 (App. Div. 1987). Petitioner's inverse condemnation claim would have been untenable in 2002 since Petitioner was unable to give NJDEP title to the property at that time. (Pa18). Furthermore, by that time, NJDEP had already issued the FWPA and FHACA permits necessary for construction of a 52,000 square foot shopping center, the only project Petitioner ever proposed for the property. Petitioner never timely challenged this application of the FWPA to the property.

In addition, Petitioner had a meaningful opportunity to assert its inverse condemnation claim against NJDEP at the commencement of the Township's condemnation, and failed to do so. The Township filed an Order To Show Cause against Petitioner under N.J. Stat. Ann. §20:3-8, demanding that it show cause why a judgment should not be rendered that the Township "is duly vested with and has duly exercised its authority to acquire the property being condemned." Petitioner never objected, and subsequently the Court held that the Township was authorized to and had duly exercised its power of eminent domain, and the Township acquired fee

simple title to the property "free and discharged of all right, title, interest and liens of all condemnees" including "all the right, title and interest of each condemnee." N.J.Stat.Ann. §20:3-20. Petitioner's appeal of the Condemnation Commissioners' award of compensation did not interfere with the vesting of title in the Township under N.J. Stat. Ann. §20:3-22. Petitioner's failure to object to the order to show cause precluded it from later claiming that DEP should be compelled to purchase the same title due to an alleged regulatory taking. This issue of state law does not present any issue of federal law for review by this Court.

CONCLUSION

For these reasons, the New Jersey Supreme Court appropriately declined to review the Appellate Division decision dismissing Petitioner's inverse condemnation claim against NJDEP, and this Petition should also be denied.

Respectfully submitted,

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Dated: March 31, 2009